



UNITED STATES PATENT AND TRADEMARK OFFICE

COMMISSIONER FOR PATENTS
UNITED STATES PATENT AND TRADEMARK OFFICE
P.O. Box 1450
ALEXANDRIA, VA 22313-1450
www.uspto.gov

Paper No. 10

CHARLES E GRAVES ASSOCIATES PC
6818 OASIS PASS
SUITE 100
AUSTIN TX 78732

COPY MAILED

MAR 08 2004

OFFICE OF PETITIONS

In re Application of
Ammicht, et al.
Application No. 09/872,810
Filed: June 4, 2001
Attorney Docket No. 5-3-15

ON PETITION

This is a decision on the Renewed Petition Under 37 CFR 1.137(a) or Under 37 CFR 1.137(b), filed March 1, 2004.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

The petition under 37 CFR 1.137(b) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)" or "Renewed Petition under 37 CFR 1.137(b)". Extensions of time under 37 CFR 1.136(a) are permitted. No fee is required for a renewed petition.

The above-identified application was held abandoned for failure to timely file a declaration **and** substitute drawings in response to the Notice to File Missing Parts of Nonprovisional Application mailed on July 31, 2001. This Notice set a shortened statutory period for reply of two (2) months for applicants to submit

an oath or declaration, together with substitute drawings. No extensions of time under 37 CFR 1.136(a) were obtained. No reply having been received, the above-identified application became abandoned by matter of law on October 1, 2001. Applicants filed a status inquiry on July 30, 2003. In response, a courtesy Notice of Abandonment was mailed on November 24, 2003. Applicants filed an alternative petition to withdraw the holding of abandonment under 37 CFR 1.181, petition to revive under 37 CFR 1.137(a), and petition to revive under 37 CFR 1.137(b) on January 21, 2004.¹ However, the petitions were dismissed on all three counts in a decision mailed on February 19, 2004.

Petition to Revive Under 37 CFR 1.137(a) (Unavoidable Delay):

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(l); and (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable. The instant petition lacks items (3) and (1).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."²

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.³

On renewed petition, petitioner asserts that he filed a declaration in response to the Notice to File Missing Parts. In support thereof, petitioner has included an itemized, date stamped postcard receipt. A postcard receipt which itemizes and properly identifies the items which are being filed serves as *prima facie* evidence of receipt in the Office of all items listed thereon on the date stamped thereon by the Office. See MPEP 503.

¹ Included with the filing of the petitions was substitute drawings.

² In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

³ See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

Accordingly, petitioner **has** established that he timely filed a declaration. However, petitioner has not accounted for the timely submission of the substitute drawings. In fact, in his original petition filed January 21, 2004, petitioner admitted that no substitute drawings were filed in response to the Notice to File Missing Parts, stating that he "erroneously concluded that the formal drawings in the instant case were already submitted." The Notice to File Missing Parts indicated that substitute drawings must be timely submitted to avoid abandonment.

In view of the above, petitioner has not shown to the satisfaction of the Commissioner that the entire period of delay in filing substitute drawings was unavoidable.

Petition to Revive Under 37 CFR 1.137(b) (Unintentional Delay):

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(d). The instant petition lacks item (1).

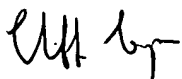
With regards to item (1), petitioner has established that he did timely file a declaration. As such, it was likely misplaced by the Office. In view thereof, petitioner still needs to submit a copy of the declaration.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (703) 872-9306
 Attn: Office of Petitions

Telephone inquiries related to this decision should be directed to the undersigned at (703) 305-0272.



Cliff Congo
Petitions Attorney
Office of Petitions